DATE: October 23, 1995
CASE NOS. 92-ERA-19
92-ERA-34

IN THE MATTER OF

RANDOLPH FRADY,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

Before me for review is the Recommended Decision and Order (R. D. and O.) of the Administrative Law Judge (ALJ) in these consolidated cases arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988).[1] The ALJ recommended dismissal of the fourteen allegations of discriminatory nonselection raised in complaints filed on August 21, 1991, September 24, 1991 and January 21, 1992. The allegations with respect to employment positions numbered 1, 3, 7, 8 and 11-14, *see* Respondent's Exhibit (RX) 1,[2] were dismissed in response to the motion for summary judgment filed by Respondent, Tennessee Valley Authority (TVA). R. D. and O. at 2; *see* Hearing Transcript (T.) 318-31. The ALJ reached the merits of the discriminatory allegations regarding employment positions numbered 2, 4, 5, 6, 9 and 10 and recommended that those complaints be dismissed based on the failure of Complainant, Randolph Frady (Frady), to establish discrimination under the ERA. R. D. and O. at 6-9. Upon careful review of the complete record before me and the findings and conclusions of the ALJ, I agree that the complaints concerning employment positions numbered 1, 3, 5, 7, 8, 9, 10 and 11-14 should be dismissed, but reject the conclusion that Frady has failed to carry his burden to demonstrate discrimination under the ERA in regard to employment positions numbered 2, 4, and 6.

DISCUSSION

A. Summary judgment

[PAGE 2]

A motion for summary judgment in an ERA case is governed by 29 C.F.R. §§ 18.40 and 18.41. *See, e.g., Trieber v. Tennessee Valley Authority, et al.,* Case No. 87-ERA-25, Sec. Dec., Sept. 9, 1993, slip op. at 7-8. This section, which is derived from Rule 56 of the Federal Rules of Civil Procedure (FRCP), permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d)(1992). Thus, in order for the ALJ's granting of TVA's motion to be sustained, there must be no material facts in dispute and TVA must be entitled to prevail on the issues involved as a matter of law. *See Webb v. Carolina Power & Light Co.,* Case No. 93-ERA-42, Sec. Dec., Jul. 17, 1995, slip op. at 4-6; *Merriweather v. Tennessee Valley Authority*, Case No. 91-ERA-55, Sec. Dec., Feb. 4, 1994, slip op. at 2-3. The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to Frady. *See Gillilan v. Tennessee Valley Authority*, Case Nos. 91-ERA-31, 91-ERA-34, Sec. Dec., Aug. 28, 1995, slip op. at 5; *see also Street v. J.C. Bradford & Co.,* 886 F.2d 1472 (6th Cir. 1989).

Prior to the hearing, TVA submitted a motion for summary judgment to the ALJ. Respondent's Motion for Summary Judgment Or Judgment as a Matter of Law dated September 8, 1992. In support of that motion, TVA submitted selected portions of Frady's deposition taken by TVA on August 27, 1992, as well as the affidavits and/or declaration of three managers involved in the filling of some of the positions at issue. At the close of presentation of the testimony of the witnesses called by Frady at hearing, TVA renewed its motion for summary judgment as to all allegations of discriminatory nonselection. T. 318-24. At that time, counsel for Complainant did not object to summary judgment with regard to the positions numbered 1, 3, 7, 8 and 11-14. T. 327-28. In his post-hearing brief, Frady indicated that the allegations with regard to the positions numbered 1, 3, 7, 8 and 11-14 had been "voluntarily dismissed." Complainant's Closing Argument [Brief] at 1.

Voluntary dismissal of a complaint under the ERA is governed by Rule 41 of the FRCP, *see, e.g., Nolder v. Kaiser Engineers, Inc.*, Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 6-8. Withdrawal of counts within multiple count complaints, as are here at issue, however, is governed by Rule 15(a) of the FRCP, which concerns amendments of pleadings. Fed. R. Civ. P. 15(a); *see Mitchell v. Arizona Public Service Co.*, Case No. 92-ERA-28, ALJ Dec., Apr. 13, 1992; *see also Paglin v. Saztec Int'l,* 834 F.Supp. 1184 (WD Mo. 1993); *contra Oswalt v. Script, Inc.,* 616 F.2d 191 (5th Cir. 1980). I therefore conclude that the

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[PAGE 3]

complaints in this case have been amended to delete the counts concerning the positions numbered 1, 3, 7, 8 and 11-14, and I approve such amendments. Accordingly, I need not reach the ALJ's recommendation to enter summary judgment in favor of TVA in regard to the foregoing positions.[3]

B. Elements of proof, generally

Under the burdens of proof and production in "whistleblower" proceedings, a complainant who seeks to rely on circumstantial evidence of intentional discriminatory conduct must first make a *prima facie* case of retaliatory action by the respondent, by establishing that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 6-8, *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.* If a complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. *Id.* The complainant bears the ultimate burden of persuading that the respondent's proffered reasons are not the true reason for the adverse action, but are a pretext for discrimination. *Thomas v. Arizona Public Service Co.,* Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20, *citing St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993); *see Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994) *aff'g Smith v. Yellow Freight System, Inc.,* Case No. 91-STA-45, Sec. Dec., Mar. 10, 1993. At all times, the complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity in violation of the ERA. *Thomas,* slip op. at 20; *see Yellow Freight System, Inc.,* 27 F.3d at 1139; *see also Jopson v. Omega Nuclear Diagnostics*, Case No. 93-ERA-0054, Sec. Dec., Aug. 21, 1995, slip op. at 5 n.4.

C. The ALJ's findings of fact and conclusions of law

As discussed herein, the ALJ's analysis of the issues in this case is cursory. Although I have given careful consideration to the ALJ's ultimate factual conclusions, I have determined that, with few exceptions, those conclusions are not based on sustainable factual findings. To be sustained, all factual findings, including credibility determinations, must be supported by substantial evidence on the record considered as a whole. *Cotter v. Harris,* 642 F.2d 700, 704 (3d Cir. 1981). Where a factfinder's "theory of credibility is based on inadequate

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reasons or no reasons at all, his findings cannot be upheld." *NLRB v. Cutting, Inc.,* 701 F.2d 659, 667 (7th Cir. 1983). All relevant, probative and available evidence must be weighed by the factfinder who must make explicit statements as to what portions of the evidence are accepted or rejected. *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979). A full explanation of why specific evidence was rejected is imperative, since a factfinder "cannot reject evidence for no reason or for the wrong reason." *Cotter*, 642 F.2d at 706-07.

Credibility findings that "rest explicitly on an evaluation

of the demeanor of the witnesses" may be accorded exceptional weight by a reviewing court. *NLRB v. Cutting, Inc.*, 701 F.2d at 663. These "demeanor" findings are in contrast to credibility findings based on the substance of the testimony itself, *e.g.*, internal inconsistency, inherent improbability, important discrepancies, impeachment, and witness self-interest. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Dorf v. Bowen*, 794 F.2d 896, 901-02 (3d Cir. 1986); *Kent v. Schweiker*, 710 F.2d 110, 116 (3d Cir. 1983); *NLRB v. Cutting, Inc.*, 701 F.2d at 666; *Ertel v. Giroux Brothers Transp., Inc.*, Case No. 88-STA-24, Sec. Dec., Feb. 16, 1989, slip op. at 12 and n.7.

In the instant case, the ALJ's findings of fact are flawed in several respects. The conduct of the hearing failed "to assure production of the most probative evidence available...," as provided for under 29 C.F.R. § 24.5(e)(1)(1992). During the course of the hearing, the ALJ erroneously sustained TVA's objections to testimony that should have been admitted into evidence. This testimony falls into two basic categories.

First, testimony adduced for the purpose of showing the degree to which Frady's protected activity was the subject of discussion among TVA managers involved in quality inspection at the Sequoyah and Watts Bar nuclear plants, *see, e.g.*, T. 206; *cf.* T. 208-09, 348 (where ALJ overruled TVA's objections). *See* 29 C.F.R. § 18.801(c)(*Hearsay*. "Hearsay" is a statement, other than one made by the declarant while testifying at hearing, offered in evidence *to prove the truth of the matter asserted* [emphasis added].), § 18.803(a)(3)(not excluded by the hearsay rule: "*Then existing mental, emotional or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . .); *Pogue v. United States Dept. of the Navy*, 87-ERA-21, Sec. Dec., May 10, 1990, slip op. at 24 n.17, *rev'd on other grounds sub nom. Pogue v. United States Dept. of Labor*, 940 F.2d 1287 (9th Cir. 1987); *see also McNally v. Georgia Power Co.*, Case No. 85-ERA-27, Sec. Dec., Sept. 8, 1992, slip op. at 7 n.6.

Second, the ALJ repeatedly sustained TVA's objections to

[PAGE 5]

testimony relevant to incidents that preceded or gave rise to a previous ERA complaint filed by Frady that was resolved by a settlement agreement entered into in June 1991,[4] *see, e.g.*, T. 71; *cf.* T. 191, 349-52 (where ALJ overruled TVA's objections).[5] Frady has not attempted to resurrect his previous Section 210 complaint and nothing in the June 1991 settlement agreement or applicable precedent bars him from submitting evidence of previous acts that demonstrates retaliatory animus towards him for purposes of the instant complaints. *See* CX 1; RX 2; *see also Harrison v. Stone & Webster Engineering Group*, Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995. In view of the conclusions reached in this decision regarding supervisory animus towards Frady and the channels of supervisory communication at these plants,[6] the ALJ's errors regarding the hearing testimony do

not require remand for supplementation of the evidence pertinent to these issues. *See Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Dec., July 19, 1993, slip op. at 9.[7]

The ALJ also failed to provide adequate explanation for his resolution of the many conflicts posed by the testimony in this case. *See* R. D. and O. at 2-6; *Dobrowolsky*, 606 F.2d at 409-10. For example, he failed to explain the basis on which he found one witness to be "highly credible" or to address pertinent factors concerning either the demeanor of the witnesses or the substance of their testimony. *See* R. D. and O. at 6-9; *Universal Camera Corp.*, 340 U.S. at 496; *NLRB v. Cutting, Inc.*, 701 F.2d at 663. He also apparently failed to consider the testimony of other witnesses, including TVA supervisory personnel, that corroborates Frady's testimony, particularly in regard to the degree of animus demonstrated toward Frady by TVA supervisory personnel.[8] *See* R. D. and O. at 8.

Accordingly, as specifically indicated in the discussion of the issues *infra*, I decline to adopt the credibility determinations of the ALJ and have rendered the necessary factual findings based on a thorough examination of the record. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389-90 (8th Cir. 1995). As factual background for that discussion, I note the following.

The record indicates that Frady was initially employed by TVA in April 1978, T. 22, and remained continuously employed with Respondent until December 1990, when he received notice that he was being terminated during a reduction in force (RIF), *see* CX 1; RX 2. *See* R. D. and O. at 2. For most of his career with TVA, Frady worked in the area of quality inspection. T. at 23-25; RX 20; *see* R. D. and O. at 2. He worked as an inspector at the Sequoyah nuclear plant and, for a shorter period of time, at the Watts Bar nuclear plant. RX 20. Beginning in 1985, Frady raised various safety concerns to TVA management and to the Nuclear

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[PAGE 6]

Regulatory Commission (NRC). T. at 25-37; CX 16; RX 25. When he received notice of his impending termination in December 1990, Frady was employed by TVA as a Nuclear Inspector at the Sequoyah plant. RX 4.

Following receipt of the RIF notice in December 1990, Frady filed a complaint under Section 210 of the ERA, 42 U.S.C. § 5851, which was resolved by a settlement agreement entered into with TVA effective June 14, 1991. RX 2. Under that agreement, *inter alia*, Frady was to be reinstated with TVA for an approximate six months period during which he would be placed in the Employee Transition Program (ETP)[9] and provided an opportunity to seek other employment within TVA or with outside employers. *Id.* The agreement also provided that TVA would remove from Frady's personnel history record a service review for the period of June 2, 1989 through June 1, 1990 and a warning letter to Frady from a supervisor, T.J. Arney, dated October 10, 1990. *Id.* Pertinent to the issue of application for other positions at TVA, the agreement provided that Frady would be interviewed for a mechanical maintenance

apprenticeship at the Watts Bar nuclear plant and would be informed of his numerical ranking among the applicants. *Id.*

Prior to and during the period of June to December 1991 while Frady was participating in the ETP, he sought various positions with TVA. *See* RX 1. He was selected for none of those, however, and on August 21 and September 24, 1991 filed two of the complaints that are before me. In November 1991, Frady received a second notice of a RIF termination, which action became effective January 10, 1992. RX 4. Citing nonselection for further positions at TVA, Frady filed a third complaint on January 21, 1992.

D. TVA positions 2, 5, and 6, crafts trainee positions

1. Protected activity and knowledge -- positions 2, 5 and 6

The positions numbered 2, 5 and 6 on RX 1 are for machinist, steamfitter, and instrument mechanic trainee vacancies in training programs conducted by TVA in cooperation with pertinent crafts unions. *See* RX 7A, 9A, 10A; T. 362-64. The record indicates that candidates for each position were selected by a committee composed of a management representative, a union representative and a Human Resource Manager from TVA's Labor Relations office, Kevin B. Green, who acted as secretary for each committee and participated in the interviews and the joint evaluation of each applicant's qualifications. T. 371, 373, 388; *see also* T. 361.

To establish the requisite element of knowledge in regard to nonselection for these positions, Frady must establish that a TVA employee who had substantial input into the selection decision had knowledge of the protected activity at the time the selection

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[PAGE 7]

decision was made. *See Bartlik v. Tennessee Valley Authority,* Case No. 88-ERA-15, Sec. Dec., Apr. 7, 1993, slip op. at 4 n.1. In the instant case, the record indicates that Frady had engaged in protected activity on various occasions over the years that he was employed by TVA, including raising improper safety practices to TVA management and to the NRC, T. 25-35, 105-06; CX 16; RX 25, and culminating in his filing of the ERA complaint that was the subject of the settlement with TVA in June 1991, CX 1. *See* Section 210(a) of the ERA, 42 U.S.C. § 5851(a); *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1510-13 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1162-63 (9th Cir. 1984).

The testimony of other TVA employees, including Frady's supervisors, corroborated Frady's testimony regarding widespread knowledge of Frady's activity among TVA managers in the Site Quality Organization units at the Sequoyah and Watts Bar nuclear plants, T. 69-71 (Frady), 201, 211-12, 234 (Boykin, stating, *inter alia,* "There's lots of things that [go] on that you hear secondhand."), 302 (Smith), 348-49, 352-3 (Miller), 499-500, 518-21 (Lumpkin, stating, *inter alia,* that he heard of Frady's raising concerns to the NRC through "the hearsay routes","the rumor mill type of thing, and ... people talk"). Particularly in view of the nature of some of the concerns raised by Frady,[10] the testimony indicating that his protected

activity had been the subject of considerable discussion among staff and management at the Watts Bar and Sequoyah nuclear plants is wholly credible. *See generally Pillow*, slip op. at 4-5, 12 (discussing widespread rumors at work site regarding complainant's role in drug testing and resulting termination of four co-workers).

In sum, the credible testimony of record supports a characterization of Frady's history of protected activity as common knowledge among the members of management within the Site Quality organizations of the TVA Nuclear Power group at the Sequoyah and Watts Bar sites. *See Pillow,* slip op. at 12. The record also supports the conclusion that Green, who was on the selection committees for positions 2, 5 and 6, was familiar with those managers in the Site Quality organizations at the Sequoyah and Watts Bar plants. Green testified that, in his seventeen years of working in TVA's Employee Relations/Labor Relations unit, he had worked specifically with the Nuclear Power group, which included the Site Quality organizations at these two plants, as well as working with its parent Generating Group, as a whole. T. 361-62, 390; *see also* T. 244 (Raines). Frady testified that Phil Reynolds, a TVA personnel manager, had negotiated the June 1991 settlement for TVA. T. 144. Green testified on cross-examination that he had been informed by Reynolds, as manager of the Labor Relations office for the TVA

[PAGE 8]

Generating Group, "and others," that Frady was entitled to interviews for certain positions under the settlement between Frady and TVA. T. 426-30. Green also testified that he knew Roy L. Lumpkin, Jr., Frady's manager and the TVA signatory on the settlement agreement, albeit "indirectly" rather than "personally." T. 427. The applications that Frady filed for these positions indicated his history at TVA, including the periods during which he had been a nuclear inspector. CX 4, 7, 8. Finally, the record indicates that Frady interacted with machinists and steamfitters and their managers as a quality inspector at the Watts Bar and Sequoyah plants. T. 149-52, 159-60, 164. Two of the other three managers on the selection committees testified to their familiarity with Frady as a quality inspector around the Sequoyah plant, although they denied knowledge of his protected activity. T. 533-35 (Poole), 539-40 (Rinehart).[11]

Against this background, it is difficult to accept TVA's contention that, although Green knew that Frady had been involved in some kind of legal settlement with TVA, Green did not possess the requisite knowledge of Frady's protected activity. Particularly in view of the testimony indicating that quality inspectors at the TVA nuclear plants, including Frady, frequently engaged in protected activity in the course of their jobs, T. 457 (Ezell), 500 (Lumpkin), I conclude that at least one member on each selection committee strongly suspected, if he did not indeed know, that Frady had engaged in protected activity at the time of the committee selection proceedings. *See Pillow*, slip op. at 12, *citing Williams*, slip op. at 6. I therefore reject the ALJ's conclusion to the contrary, R. D. and O. at 7, and conclude that Frady demonstrated the requisite knowledge on the

part of individuals involved in the selection of the candidates for the crafts trainee positions.

2. Adverse action -- positions 2 and 6, machinist and steamfitter trainees

An employer's failure to select a complainant for employment does not necessarily constitute an adverse action, as an employer is free not to hire any individual absent a discriminatory reason proscribed by law. *Samodurov v. General Physics Corp.*, Case No. 89-ERA-20, Sec. Dec., Nov. 16, 1993, slip op. at 10. To establish that the failure to select Frady for any of the trainee positions constitutes adverse action, Frady must establish that he was qualified for such position; that, despite his qualifications, he was rejected; and that TVA continued to seek and/or select similarly qualified applicants. *See Samodurov*, slip op. at 11, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). I will examine the respective machinist and

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steamfitter trainee positions under the foregoing standard, *seriatim*.

Frady applied for these trainee positions at the Sequoyah plant, number 2 on RX 1, on July 3, 1991. CX 4; *see* RX 7A. Although the vacancy announcement indicated that trainees in the machinist, steamfitter and boilermaker crafts would be selected, Green testified that no boilermaker trainees were chosen, as a result of the agreement with the international representative of the boilermakers' union that TVA would accommodate by re-employment as many journeyman boilermakers formerly employed by TVA as possible, prior to employing new trainees. T. 384-85; *see* T. 366; CX 4; RX 7A.

Contrary to the ALJ's finding that Frady "lacked the necessary aptitude" to perform this job, R. D. and O. at 8, the record indicates that there is no issue concerning whether Frady met the minimum qualifications for these trainee positions at the Sequoyah nuclear plant, *viz.*, the General Aptitude Test Battery (GATB), 18 years of age, high school diploma/GED certificate, and minimum scores on the American College Test (ACT) for mathematics, natural science and the composite score. *See* CX 8; *see also* Respondent's Post-hearing Brief at 33. A joint labor-management committee interviewed Frady, as well as other applicants.[12] T. 362-65. Six candidates were selected for the machinist trainee slots and six candidates were selected for the steamfitter slots. T. 375, 398. Frady was ranked eighth out of the field of candidates for each of the two programs. RX 7C. Green testified regarding the qualifications of some of the candidates that were ranked ahead of Frady for the Sequoyah steamfitter and machinist positions. T. 375-81, 385-95, 438-40. Although Green attempted to distinguish the candidates ranked ahead of Frady by the committee based on a common theme of relevant "hands on" experience, T. 374-80, 389-95, 438-49, Green's testimony clearly indicates that selectees were chosen who possessed similar qualifications to those of Frady.[13]

For example, although Green testified that Frady's ranking among the candidates for the steamfitter position was diminished by the fact that Frady's position of nuclear inspector had

required him to watch others work and to inspect their work, rather than performing the work himself, *see, e.g.*, T. 425, Green characterized another candidate as more highly qualified to be a steamfitter trainee than Frady because that candidate, as a sheet metal foreman, "was basically quite familiar with what a steamfitter did." T. 379. Frady's resume, TVA application form and his testimony indicate that, in the years that he had worked with TVA, he had been exposed to plant components which are serviced by steamfitters, CX 8; T. 23-4, 157-58.[14] As acknowledged by Green on cross-examination, Frady had described

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[PAGE 10]
in his interview for the steamfitter position the extent of his exposure to the pipes, valves and pumps that the steamfitter trainee would be servicing at the Sequoyah plant, but the committee members did not consider it to be a significant factor in assessing Frady's qualifications. T. 441-43.

Similarly, in regard to "hands on" experience that would be relevant to the machinist trainee position, Green cited the experience of another candidate who had operated a yarn machine in a factory and who had assisted her husband, who owned a heating and air-conditioning equipment company, on "some" occasions in an unspecified manner in the installation of such equipment, T. 443-46, but stated that Frady's use of calibration tools as a nuclear inspector was not considered relevant because such measuring tools were "specialized", T. 446-49. Furthermore, although Green testified that the selection committee members had relied on activities such as working on automobile engines as a hobby or having completed a painter apprenticeship to determine that candidates possessed a desirable degree of "manual dexterity" and "mechanical aptitude", T. 378, 421, 424, Green stated that Frady's experience with constructing his residence did not favorably impress the selection committee, T. 380-81.[15] Consequently, I reject the ALJ's contrary conclusion and find that the record demonstrates that similarly qualified candidates were selected and, thus, that Frady's nonselection for the steamfitter and machinist trainee positions at the Sequoyah nuclear plant constituted an adverse action. *See Samodurov,* slip op. at 11 *citing McDonnell Douglas Corp.*, 411 U.S. at 802.

Position number 6 on RX 1 is for machinist and steamfitter trainee positions at the Watts Bar nuclear plant. CX 8; RX 11A. Frady applied for the position on June 25, 1991. CX 8. As with position number 2, there is no question that Frady met the minimum qualifications -- GATB, 18 years of age, high school diploma/GED certificate and minimum scores on the ACT -- for these positions. *See* CX 8. Although the vacancy announcement indicated that trainees in the machinist, steamfitter and boilermaker crafts would be selected, Green testified that, in view of the large number of applicants, the union determined that each candidate would be interviewed for either the machinist or the steamfitter position, rather than both, with the exception of one TVA employee, who was task qualified in both areas. T. 411-16. As with position number 2, Green testified that no boilermaker trainees were selected from the applicants. T. 384-85; *see* discussion *supra*.

Frady was interviewed by the selection committee for the machinist trainee position. T. 412.[16] Green testified that six candidates were selected for the machinist trainee slots and six candidates were selected for the steamfitter trainee slots. T. 413. Frady was ranked twelfth

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among the candidates by the union committee member, thirteenth by the management committee member. RX 11C.

With regard to whether the selectees held similar qualifications to those of Frady for these Watts Bar machinist trainee positions, Green's testimony, once again, focused only on the "hands on" experience of the selectees, which Green attempted to distinguish from that of Frady. T. 410-25, 438-49. For the reasons discussed in the analysis of this issue in the context of position 2, *supra*, I again conclude that candidates having qualifications similar to those of Frady were selected, and therefore that Frady has demonstrated that his nonselection for the position of machinist trainee at the Watts Bar plant constituted an adverse action. *See Samodurov*, slip op. at 11, *citing McDonnell Douglas Corp.,* 411 U.S. at 802. I thus reject the contrary conclusion of the ALJ, R. D. and O. at 8.

3. Temporal proximity and inference of retaliatory motive -- positions 2 and 6, machinist and steamfitter trainees

Temporal proximity between protected activities and the adverse action against a complainant under the ERA has been held sufficient to establish the inference that the adverse action was motivated by the protected activity. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Kahn v. Commonwealth Edison Co.,* Case No. 92-ERA-58, Sec. Dec., Oct. 3, 1994, *aff'd sub nom. Kahn v. U.S. Department of Labor,* 1995 U.S.App. Lexis 24111 (7th Cir. 1995); *Rainey v. Wayne State Univ.,* Case No. 89-ERA-48, Sec. Dec., Apr. 21, 1994; *McCuistion v. Tennessee Valley Authority,* Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991. In the instant case, Frady had most recently engaged in protected conduct by pursuing resolution of the ERA complaint that he had filed in January 1991 through negotiation of the settlement agreement entered into in June 1991. As noted *supra*, Green was clearly aware that Frady had entered into a settlement with TVA and the evidence supports the conclusion that at least one member of each selection committee knew or strongly suspected that Frady had engaged in protected activity. The interviews and selections for the trainee slots included under positions 2 and 6 occurred within two to three months after Frady entered into the June 1991 settlement. T. 432-37; RX 11C at 2,3.[17] Frady has thus established an inference of retaliatory motive based on temporal proximity. *See Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 11-12, *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993)(table)(causation established where seven or eight months elapsed between protected activity and adverse action).

[PAGE 12]

4. Discriminatory motive -- positions 2 and 6, machinist and steamfitter trainees

At hearing, TVA presented the testimony of Green and three other managers who served on the selection committees indicating that the trainee selections had been based on the superior qualifications of the selectees. As TVA thus met its burden of articulating a legitimate, nondiscriminatory basis for its action, the analysis now shifts to the issue of whether Frady has demonstrated that such basis is merely pretextual and that TVA's action was actually based on a discriminatory motive. *See Yellow Freight System, Inc.*, 27 F.3d at 1139-40; *Pillow*, slip op. at 13, *citing St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 419; *Dartey*, slip op. at 6-9. Frady may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Pillow*, slip op. at 14; *Dartey*, slip op. at 8. In order to determine that Frady has established discriminatory action in regard to these nonselections by TVA, however, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 424; *see Yellow Freight System, Inc.*, 27 F.3d at 1139; *Pillow*, slip op. at 14-15. Although found to be pretextual, an employer's stated reasons may nonetheless be found to be a pretext for action other than prohibited discrimination. *See Galbraith v. Northern Telecom*, 944 F.2d 275, 282-83 (6th Cir. 1991). The ultimate inquiry is thus whether Frady has demonstrated that he was not selected for these trainee positions because of his history of engaging in protected activity.

It is well established that, in employee discrimination cases, "[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *quoted in Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). In the context of a case such as this, which involves a nuclear inspector, it must also be borne in mind that "[a]t times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay." *Mackowiak*, 735 F.2d at 1163. The record indicates that such was the case with Frady, who was characterized as "a pretty technical inspector," T. 212 (Boykin), and who had raised various substantial safety concerns to management and to the NRC, *see* n.10, *supra*. As stated by the *Mackowiak* court, the ERA does

[PAGE 13]

not allow "discrimination based on competent and aggressive work" and employers may not discriminate against "quality control

inspectors because they do their jobs too well." 735 F.2d at 1163. Without protection from retaliation, nuclear inspectors can simply not function effectively in their extremely important role in the NRC regulatory scheme. *See Mackowiak*, 735 F.2d at 1163. The significance of safety in the nuclear industry cannot be gainsaid, and, as indicated by Frady's testimony, T. 105-07, there is a crucial public interest at stake when issues of non-compliance with safety regulations arise. *See Hoffman v. Fuel Economy Contracting,* Case No. 87-ERA-33, Sec. Ord., Aug. 4, 1989, slip op. at 4.

As indicated in the context of the adverse action discussion *supra,* I do not find the testimony indicating that the selectees for the machinist and steamfitter trainee positions were found by each committee to be better qualified than Frady based on their "hands on" experience to be persuasive. In addition to the reasons noted above, the following factors suggest that bias against Frady played a role in his evaluation by these committees.

The record contains various indicia that the knowledge and/or suspicions of the committee members about Frady's history of protected activity had an adverse effect on his participation in the interview process. In its cross-examination of Frady, TVA attempted to demonstrate that, if Frady did have "hands on" experience pertinent to his candidacy for these positions, he had failed to adequately present such information to the committee. T. 157-59. Similarly, Green's testimony emphasized the possibility that Frady had not fully apprised the committee members of such pertinent information during the interview process. T. 380-81; *see* T. 421-22; *see also* T. 554-555 (Rinehart).

In direct examination, Frady had testified that the interview for the Watts Bar trainee position was over "real quick." T. 58-9. In response to questions on cross-examination regarding whether he had volunteered any information regarding pertinent "hands on" experience to the Sequoyah selection committee, Frady indicated that the committee had not shown an interest in his experience with using tools after he had responded in the negative to the question of whether he had ever rebuilt an automobile engine. T. 158. In contrast, the record suggests that other candidates could have been "primed" in advance to assist them in answering the standard questions that were asked of each applicant.[18] I therefore reject the ALJ's contrary conclusion, R. D. and O. at 8, and find that the basis provided by TVA for the nonselection of Frady for the trainee positions numbers 2 and 6 was pretextual. *See Yellow Freight System, Inc.,*

[PAGE 14]

27 F.3d at 1139.

Furthermore, the evidence indicates the the "marginal" service review and letter from Arney that were to be removed from Frady's personnel history record (PHR) pursuant to the June 1991 settlement may have been reviewed by Green in his preparation of the paperwork for use by the selection committees in evaluating the candidates for these trainee positions. Frady's uncontradicted testimony indicated that, in mid-July 1991, he

checked his records at a TVA personnel office and found that the service review and letter from Arney had not yet been removed from his PHR. T. 43-4; *see also* T. 73-4, 77, 104-05, 121-22. The record also indicates that the PHR was not corrected in conformance with the terms of the settlement agreement until at least July 30, 1991. *See* T. 124-25 (Frady), 268-69 (Sewell).[19] Green testified on cross-examination that, in the course of preparing the paperwork regarding the applicants' qualifications for use by a selection committee, he would, as a routine matter, have examined a copy of the PHR for each of the candidates who were TVA employees. T. 431-37. He also stated that, although he could not recall having reviewed Frady's PHR, if he had done so it would have been prior to August 1991. T. 450-53. In view of the link between the "marginal" performance review, as well as the Arney letter, and Frady's initial Section 210 complaint, it is evident that reliance on such personnel materials would effectively constitute discrimination against Frady on the basis of protected activity.

It is also significant that the testimony of two TVA managers indicated that TVA policy required filling vacancies from within the ranks of TVA employees, including those in the ETP, if such employees were qualified. *See* T. 255-56 (Raines), 431 (Green); *see also* T. 38-9, 59 (Frady), 309-10 (Smith). In view of the number of similarly qualified candidates who were hired from outside TVA for the machinist and trainee positions -- eleven out of eighteen selectees for the three positions -- however, it appears that Frady was not given the benefit of that policy.

TVA's position is not enhanced by the manner in which it presented evidence in support of its reasons for not selecting Frady for the machinist and steamfitter trainee positions. Green repeatedly indicated that he was a "facilitator" and a "neutral party" in the selection process, insofar as the evaluation of technical qualifications was concerned, and referred to the management and union representatives serving on the committees as crafts experts who were "the selecting officials." T. 373, 394-95, 401, 403, 410, 440, 449. TVA, however, relied almost entirely on Green's testimony concerning the relevant qualifications and "hands on" experience of the selectees, and although the three other managers who served on the committees

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were called by TVA as witnesses, TVA did not seek to substantiate Green's detailed testimony through extensive questioning of those witnesses. *See* T. 530-35 (Poole), 535-56 (Rinehart), 557-61 (Swanson). Indeed, only one of the three was asked about the selectees' qualifications.[20] *See St. Mary's Honor Center*, 113 S.Ct. at 2749, 125 L.Ed. 2d at 418-19 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.")

Finally, the evidence in this case indicates that Frady was the subject of a considerable degree of animus from supervisory personnel in his chain of command at TVA. Frady's testimony concerning both his personal knowledge and second-hand

information regarding negative comments made by various supervisors about Frady's protected activity was corroborated by the testimony of others, including TVA supervisors. *See* T. 201-09, 211-12 (Boykin), 301-05 (Smith), 347-53 (Miller), 355-56, 520 (Lumpkin).[21] Although Frady surrendered any claims arising from the Arney letter and the "marginal" performance review in the June 1991 settlement, CX 1; RX 2, those supervisory actions provide further evidence of the history of antagonism by some supervisors against Frady. I conclude that such animus was transmitted through the supervisory communication channels already discussed and manifested itself in discriminatory treatment of Frady in the selection process. I accordingly conclude that Frady has carried his burden to demonstrate that he was discriminated against by the selection committees for the machinist and steamfitter positions at the Watts Bar and Sequoyah plants on the basis of protected activity. *See Thomas*, slip op. at 22-23.

5. Adverse action and discriminatory motive -- position 5

Position number 5 on RX 1 is for the position of instrument mechanic trainee at the Sequoyah nuclear plant. RX 10A. Frady applied for that position on July 18, 1991. CX 7; RX 10B. In addition to the minimum qualifications of the GATB, 18 years of age, high school diploma or GED certificate, and minimum scores on the ACT, this position required a "technical Associate of Science degree from a regionally accredited college or equivalent." RX 10A. Frady was interviewed for the position by a labor-management committee. T. 400. Following the hearing, TVA urged that Frady was not qualified for this position because he lacked the requisite "basic knowledge of electronics." Respondent's Post-hearing Brief at 33-35. Although I reject TVA's argument that Frady failed to meet the minimum qualifications posted for this position, *see* RX 10A,[22] and thus conclude that Frady met the threshold *McDonnell Douglas Corp.*

[PAGE 16]

requirement to show that his nonselection constituted an adverse action, I nonetheless conclude, on the following basis, that TVA has provided legitimate nondiscriminatory reasons for its failure to select Frady for the instrument mechanic trainee position.

Green testified concerning the qualifications of the six selectees for the instrument mechanic trainee position and distinguished between their qualifications and those of Frady based on 1)a relative lack of knowledge regarding electronics equipment; 2)the distinction between experience with electrical equipment and with electronic equipment; and 3)the "hands on" experience of the selectees relevant to electronics work. T. 395-411.[23] This testimony is convincing.[24] Frady's testimony, although clearly demonstrating a knowledge of electrical components, did not demonstrate that the foregoing reasoning was a pretext for discriminatory non-selection. T. 24, 28-9, 78-81, 152-54. I therefore conclude that Frady has not demonstrated that his nonselection for the position of instrument mechanic trainee was motivated by retaliatory intent. Furthermore, assuming that Frady's history of protected activity as a nuclear inspector played a role in the committee's nonselection of Frady, TVA has demonstrated that

Frady would not have been selected for this position in view of the superior qualifications of the candidates who were selected. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 244-45 (1989); *Gibson v. Arizona Public Service Co.,* Case Nos. 90-ERA-29, 90-ERA-46, 90-ERA-53, Sec. Dec., Sept. 18, 1995; *Rainey,* slip op. at 6-7. I thus agree with the ALJ's ultimate conclusion that Frady did not demonstrate discriminatory nonselection in regard to position 5.

E. TVA position 4, permanent nuclear inspector

1. Protected activity and knowledge -- position 4

Position number 4 on RX 1 is for a grade level SE-5 nuclear inspector position at the Sequoyah plant. RX 9A. Lumpkin testified that he authorized the posting of the vacancy announcement for the inspector position but decided in August 1991 not to fill that position because of down-sizing concerns. T. 502-05, 523; *see also* T. 344-46 (Miller). Lumpkin acknowledged that, as a senior manager over Frady prior to his initial RIF in December 1990, he was familiar with Frady's raising of safety concerns both within TVA and to the NRC, and also that he was familiar with the June 1991 settlement agreement with Frady, which he signed. T. 499-500, 518; *see* CX 2. Lumpkin therefore had knowledge of Frady's protected activity at the time that he decided not to fill the nuclear inspector position.

2. Adverse action -- position 4, nuclear inspector

Frady applied for the nuclear inspector position on July 16, 1991. CX 6; RX 9B. The record reveals that Frady was clearly qualified for the position, as he had served in that capacity at

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both the Sequoyah and Watts Bar nuclear plants, and had performed at the SE-5 level prior to being terminated from that position in December 1990. RX 20. I also note that the record indicates that Frady's performance as a nuclear inspector was satisfactory; the most recent periodic review of his performance that is in evidence indicates that "[t]otal service was better than fully adequate," RX 20, and his immediate supervisor testified that there had been no problems with the quality of Frady's work as a nuclear inspector, T. 355-56.[25]

Although, in August 1991, Lumpkin decided not to fill the nuclear inspector position, the record indicates that at least two inspectors at the SE-5 grade level were returned to work at the Sequoyah nuclear plant after the vacancy announcement was cancelled. *Cf. Samodurov,* slip op. at 11 (requiring a complainant to establish that the employer sought and/or selected similarly qualified candidates following rejection of the complainant, pursuant to *McDonnell Douglas Corp.* criteria). In deposition testimony, TVA 2 at 129-31, Frady stated that two other nuclear inspectors, who had also filed complaints against TVA under the ERA, returned to their positions as nuclear inspectors at the Sequoyah plant pursuant to the terms of a settlement agreement; this testimony was corroborated by that of one of those inspectors, Dewey Ray Smith, T. 298-303, as well as the testimony of James Boykin, a TVA examiner in the electrical field at TVA's Sequoyah Training Center, T. 234. *See Smith and Smith v.*

Tennessee Valley Authority, Case Nos. 92-ERA-23, 92-ERA-24, Sec. Ord. [Approving Settlement], Aug. 31, 1992.[26] I therefore conclude that TVA, in effect, filled the announced nuclear inspector vacancy with similarly qualified candidates and that Frady has thus established that the failure to select him for the position of nuclear inspector at the Sequoyah plant constitutes an adverse action. *See Samodurov*, slip op. at 11, *citing McDonnell Douglas Corp.*, 411 U.S. at 802.[27]

3. Temporal proximity and inference of retaliatory motive -- position 4, nuclear inspector

As discussed *supra,* temporal proximity between protected activities and the adverse action may be sufficient to support an inference of retaliatory motive. *Couty,* 886 F.2d at 148; *Rainey,* slip op. at 5-6; *McCuistion,* slip op. at 8. In the instant case, Lumpkin testified that he decided not to fill the nuclear inspector position in August 1991. T. 523. That timeframe was within a few months of the execution of the June 1991 settlement between Frady and TVA. Furthermore, Lumpkin testified that although he was unsure whether he had been told at that time that Frady had applied for the job,[28] T. 509-10, he was "reasonably certain if [Frady] wanted the inspector job at

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[PAGE 18]

Sequoyah, he would have applied." T. 523. I therefore conclude that Lumpkin strongly suspected, if he did not have certain knowledge, that Frady had applied for the position; thus any uncertainty in the record concerning such knowledge does not preclude a finding of retaliatory motive in regard to Lumpkin's decision not to fill the inspector vacancy.[29] *See Pillow*, slip op. at 12, *citing Williams*, slip op. at 6. I conclude that Frady has thus established an inference of retaliatory motive based on temporal proximity.

4. Discriminatory motive -- position 4, nuclear inspector

TVA asserted that Lumpkin's decision not to fill the inspector vacancy was based on his concerns about downsizing under the T.D. Martin staffing study[30] and was not motivated by discriminatory intent. Respondent's Post-hearing Brief at 10-11; *see* RX 9B; T. 501-09. The ALJ accepted this contention. R. D. and O. at 4, 8. A review of the record, however, indicates that much of Frady's testimony concerning antagonistic exchanges with Lumpkin, T. 179-91, is corroborated by statements made by Lumpkin at hearing, *see* T. 520-29.[31] On the basis of the degree of animus exhibited toward Frady, I disagree with the ALJ and conclude that the decision not to fill the nuclear inspector vacancy was based, at least in part, on discriminatory intent. *See Harrison,* slip op. at 8. When the evidence establishes that discriminatory intent played a role in an adverse action, the employer may avoid liability only by demonstrating that the action would have been taken on the basis of a legitimate motive alone. *Yellow Freight System, Inc.*, 27 F.3d at 1137, 1140 (holding that *St. Mary's Honor*

Center did not disturb mixed motive doctrine); *Mackowiak*, 735 F.2d at 1163-64, *citing Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977)[further citations omitted]. Under the dual motive analysis, the employer "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak*, 735 F.2d at 1164, *quoting NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983); *see Harrison*, slip op. at 9-10; *Pillow*, slip op. at 14-15.

The evidence relevant to the issue of whether Lumpkin would have declined to fill the inspector position on the basis of the pressure to downsize alone does not provide adequate substantiation for Lumpkin's testimony. The record contains a copy of a draft of the T.D. Martin staffing study and a cover memorandum written by Lumpkin to higher TVA management providing his input regarding the study's recommendations for downsizing. RX 9B. The memorandum, dated August 19, 1991, indicates that, although the staffing study recommended the addition of a quality inspector position on Lumpkin's staffing plan, Lumpkin had decided that he would not avail himself of this opportunity to enlarge his staff of quality inspectors and, also, that he would

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[PAGE 19]

not fill the pre-existing vacant inspector position that he had advertised.[32] *Id.* Contrary to the ALJ's finding, R. D. and O. at 4, the downsizing study did not mandate that the quality inspector position not be filled. The conclusion that Lumpkin was not motivated by the recommendations of the staffing study is further supported by the following.

Lumpkin pointed out at hearing that the August 1991 memorandum also indicated his decision not to fill a quality auditor vacancy, and he urged that this was because he felt that he could use these vacancies as opportunities for downsizing through attrition. T. 507. He did not, however, note that his staff at that time included 4 more Quality Auditors than recommended by the staffing study, which contrasts significantly with the fact that the staff had 2 fewer Quality Control inspectors than recommended by the study. *See* RX 9B. Also, Lumpkin testified that, in August 1991, he had "about 59 or 60" employees in his unit,[33] and that, under the staffing study, his staff should be reduced to 54 in approximately four to five years. T. 505. Contrary to his testimony, his August 19, 1991 memorandum indicates that he then had 57 employees. RX 9B.

Furthermore, I note that the sequence of events immediately prior to the decision not to fill the position is suspicious. *See Mackowiak,* 735 F.2d at 1162; *Harrison*, slip op. at 9. Smith testified that the vacancy announcement for the Sequoyah nuclear inspector position was not posted at the Eastgate ETP office location in Chattanooga, where he and Frady were assigned, and that only by virtue of his interception of a misdirected telephone call from a TVA lead inspector did Smith discover that a vacancy announcement for an inspector position at Sequoyah had been issued. T. 306-07.[34] Frady and Smith both testified that Frady hand delivered their applications, along with those of other inspectors in the ETP, to the designated personnel officer. T. 42, 46-7 (Frady), 307-08

(Smith); *see* nn.28-9, *supra*. Frady testified that, within a few days after he submitted those applications, he was notified of the management decision not to fill the position. T. 46, 175-77.

On the foregoing basis, I conclude that Lumpkin made his decision not to fill the advertised nuclear inspector vacancy because he knew or strongly suspected that Frady had applied for the position. Although Lumpkin may have been debating the issue of whether to fill the position prior to that time, he resolved his doubts against filling the position based on his intention not to provide that employment opportunity to Frady. *See Harrison,* slip op. at 9-10. I therefore reject the ALJ's finding to the contrary and conclude that Frady has demonstrated that he was discriminated against in the closing of the vacancy for the SE-5 nuclear inspector position.

[PAGE 20]

F. Position 9, temporary nuclear inspector

Position number 9 on RX 1 is for temporary nuclear inspectors to assist at the Sequoyah nuclear plant during an outage that occurred in September, October and November 1991. T. 225 (Boykin); *see* RX 19A. This position was not a job vacancy in the ordinary sense. The record indicates that, at the time of the plant outage,[35] several TVA employees whose positions as quality inspectors had been eliminated were participating in the ETP and were thus available to assist in filling the need for extra inspectors during the outage. T. 220-25 (Boykin). As those employees were already collecting regular paychecks under the ETP, their participation as inspectors during the outage would not result in any additional income, unless they were given the opportunity to work overtime. T. 223-24 (Boykin), 316 (Smith). The temporary inspectors would, however, have the opportunity to make contacts that could be useful to them in seeking employment opportunities in the future. T. 223-24.

In regard to this position, Frady alleged that he was not timely advised by management of the opportunity to work during the outage or of how to apply. T. 39-41; *see* T. 116-18; R. D. and O. at 4-5, 8. Frady also questioned why his name was not included in a list of qualified ETP employees that was circulated to ETP offices. T. 39-41, 119-21; *see* RX 19A.

The testimony of TVA supervisors Miller and Boykin indicates that there was considerable confusion regarding how best to solicit the participation of ETP employees as temporary inspectors during the outage. T. 222-27, 230-36 (Boykin), 342-47, 358-60 (Miller). TVA management recognized that it would be a cost-savings approach to enlist the aid of additional inspectors during the outage from the ranks of qualified employees in the ETP, but it became apparent that the ETP status of the inspectors and the temporary nature of the positions would complicate this approach. *See id.* Boykin testified that he initially attempted to personally contact ETP personnel about working in the outage but, upon recognizing that he could not personally contact all ETP offices and in the interest of alerting all interested employees, he contacted Charlotte Hale, a staffer in the TVA Employment Services Office, for assistance.

T. 225-27. Hale testified that she generated a list of qualified ETP employees by using "quality" in a word search of TVA's computerized personnel files; by using "quality" rather than "nuclear" she failed to include the names of Frady and other nuclear inspectors. T. 285-87, 289-92; *see* R. D. and O. at 4. The list generated by Hale was then forwarded to ETP locations for posting along with the announcement of these temporary positions. T. 283-84. Frady stated that he did not see the announcement until after the closing date, at which time he,

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[PAGE 21]

along with other interested inspectors at the ETP, telephoned Miller to ask how to apply and were told that Miller would ensure that they were called to participate. T. 40-41.

Without resolving the preliminary issues under the *McDonnell Douglas Corp.* framework, *see Samodurov,* slip op. at 11, I conclude that Frady has not carried his ultimate burden of demonstrating that he was excluded from participation under this temporary position based on intentional discrimination. *See Yellow Freight System, Inc.,* 27 F.3d at 1139-40. Initially I note that the failure to include Frady, and other nuclear inspectors, on the list appended to the vacancy announcement was adequately explained by Hale's testimony to be the result of inadvertence, or, at worst, inefficiency. *See id.* Furthermore, I consider the testimony of Boykin and Miller to be exceptionally forthright and devoid of any indication of animus towards Frady. The testimony of Boykin and Miller indicates considerable confusion as to the procedures to be followed in accepting applications for these temporary positions, *i.e.,* whether they would go through the usual route of being submitted to Boykin first, who would then forward them to Miller for approval, or whether they could go directly to Miller. T. 229-31 (Boykin), 342-43 (Miller). In an attempt to maintain some order in this process, it was agreed that Boykin would accept the applications and then seek approval of the candidates from Miller. T. 231 (Boykin), 342-43 (Miller). When considered together, the testimony of Frady, Boykin and Miller indicates miscommunication resulting from this confusion. When contacted by telephone by Frady and his fellow inspectors at ETP regarding participation in the outage, Miller indicated his agreement to their participation. *See* T. 342-43. This statement was apparently understood by Frady to indicate that it was unnecessary to apply through Boykin, although that was not the case. T. 230-31 (Boykin). Based on this misunderstanding, Frady failed to file an application with Boykin. T. 116-18. I therefore conclude that the evidence does not establish that discriminatory intent played any role in Frady not receiving adequate notice and instruction concerning application for this position. I accordingly agree with the ultimate conclusion of the ALJ that the complaint in regard to position 9 should be dismissed. R. D. and O. at 8.

G. Position 10, Stone & Webster civil inspector

Position number 10 on RX 1 is that of civil inspector with Stone & Webster (SWEC), a contractor that provided quality inspectors at the Watts Bar nuclear plant, with candidates for

such positions being subject to approval by TVA management. T. 472-73 (Barcum); R. D. and O. at 5. Frady alleges that TVA blacklisted him on the basis of his history of protected activity

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[PAGE 22]
and thus interfered with his securing a position with SWEC. Specifically, Frady testified that Ed Barcum, a personal acquaintance who worked with SWEC, solicited Frady's resume following his receipt of the RIF notice in November 1991. T. 47-51. Frady also testified that, after he had sent the resume to Barcum and received no further word regarding a position with SWEC, he contacted Barcum, who explained that he had been directed not to broach the subject of hiring Frady as an inspector again, at the risk of imperiling his own position with SWEC. T. 51-2. Frady further testified that Barcum told him that a TVA supervisor with whom Frady had worked previously had destroyed the copy of Frady's resume that he had sent to Barcum. T. 51-2; *see* 52-5, 195-96.

In his hearing testimony, Barcum denied Frady's version of events, stating that, although he had asked Frady to send him a resume for consideration, Frady had not done so. T. 473-77. Barcum also denied that he had told Frady that a TVA manager, Duane Ezell, had destroyed Frady's resume and indicated a hostile attitude towards Frady. T. 477-78. James E. Mann, also of SWEC, testified that he, as Barcum's supervisor, was responsible for acting as liaison to Ezell at TVA and he, rather than Barcum, would have been responsible for referring Frady's resume to Ezell, had Frady submitted one to Barcum. T. 487-91.

In order for Frady for prevail on his blacklisting claim in this case in which it is alleged that TVA, rather than SWEC, has discriminated against him, Frady must establish that TVA intentionally interfered with an employment opportunity available to Frady through SWEC. *See Bartlik v. Tennessee Valley Authority,* Case No. 88-ERA-15, Sec. Ord., July 16, 1993, slip op. at 4-5; *Doyle v. Bartlett Nuclear Services*, Case No. 89-ERA-18, Sec. Dec., May 22, 1990. Without ruling on the preliminary issues under the *McDonnell Douglas Corp.* framework, I conclude that Frady has failed to establish that TVA intentionally interfered with an employment opportunity available through SWEC. *See Yellow Freight System, Inc.,* 27 F.3d at 1139-40.

Frady's testimony, and that of his former co-worker Smith, established that Ezell had knowledge of Frady's protected activity and had indicated animus towards Frady as a "whistleblower",[36] T. 576-77 (Frady), 301-02 (Smith). Both Barcum and Mann denied, however, that Ezell had discussed Frady with them, T. 478, 488-89, and, on cross-examination Complainant's counsel failed to elicit testimony that would support an inference of such communication. *See generally Mackowiak*, 735 F.2d at 1162. Without evidence that Ezell, or another TVA employee, had intentionally interfered with any employment opportunity that Frady may have had available to him with SWEC,[37] Frady cannot establish retaliatory action under the ERA against

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[PAGE 23]

TVA. *See Bartlik,* slip op. at 4-5. I therefore agree with the ultimate conclusion of the ALJ that the complaint against TVA concerning the SWEC inspector position should be dismissed.

CONCLUSION

I find that Complainant was discriminated against in violation of Section 210 of the ERA by Respondent when he was not selected for hire for the machinist and steamfitter trainee positions at the Watts Bar and Sequoyah nuclear plants and for the position of SE-5 nuclear inspector at the Sequoyah plant. Accordingly, Respondent is ORDERED to offer Complainant the machinist trainee, or comparable, position; the steamfitter trainee, or comparable, position; and the SE-5 nuclear inspector, or comparable, position; to pay all appropriate back pay and other appropriate compensation allowed under the ERA; and to pay Complainant's costs and expenses in bringing these complaints, including a reasonable attorney's fee. This case is hereby REMANDED to the ALJ for such further proceedings as may be necessary to establish Complainant's complete remedy, consistent with this decision; the calculation of back pay should be based on the difference between Complainant's earnings and the amount that Complainant would have earned during the period from the earliest applicable starting date of the pertinent position *supra* until the actual appointment date of Complainant to such position, or Complainant's refusal of such offer.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the ERA for claims filed on or after its date of enactment, October 24, 1992. As a result of these Amendments, Section 210 of the Act has been redesignated as Section 211. These Amendments do not apply to this case, in which the complaints were filed in August and September of 1991 and January of 1992; the pre-Amendments statutory references have therefore been used.

[2] For purposes of referencing the fourteen jobs addressed in the instant complaints, I will follow the ALJ's approach and use the numbers assigned to each position on RX 1. *See* R. D. and O. at 2.

[3] I note, however, that to the extent that TVA's argument in support of entry of summary judgment is premised on a requirement for direct evidence of discriminatory motive, it lacks merit. *See Huguley v. General Motors Corp.,* 52 F.3d 1364, 1371 (6th Cir. 1995), *and cases cited therein* (discussing importance of framework provided by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), to complainants who must frequently rely on circumstantial evidence to support allegation

of employment discrimination); *Ellis Fischel State Cancer Hosp. v. Marshall,* 629 F.2d 563, 566-67 (8th Cir. 1980)(rejecting employer's argument regarding lack of testimony concerning "personal and direct knowledge of retaliatory motivation" in ERA case); *see also United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716 (1983)(noting that, in employment discrimination cases, there will rarely be "eyewitness" testimony concerning employer's mental processes*); Benson v. Northwest Airlines, Inc.*, 1995 U.S. App. Lexis 22008 (8th Cir. Aug. 15, 1995), at 3, *quoting Crawford v. Runyon,* 37 F.3d 1338, 1341 (8th Cir. 1994) (discussing "rare instances" in employment discrimination cases in which there is no dispute of fact and evidence will support only one conclusion). Furthermore, TVA's apparent refusal to cooperate with Frady's informal attempts at discovery, *see* T. 85-6, 136-38, 155-56, 167-69; *see also T.* 64, 95, 134, 166, raises the issue of the propriety of entry of summary judgment in favor of TVA on procedural grounds, *see Gillilan*, slip op. at 11, *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986); 29 C.F.R. § 18.40(d)("The administrative law judge may deny the [summary judgment] motion whenever the moving party denies access to information by means of discovery to a party opposing the motion"). It is unclear why the complainant did not engage in formal discovery, as provided for at 29 C.F.R. §§ 18.13 *et seq.*, *see also* 29 C.F.R. § 24.5(e)(1)("*Evidence*. Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied.")

[4] The ERA requires that settlement of a complaint be approved by the Secretary. 42 U.S.C. § 5851(b)(2)(A); *Macktal v. Secy. of Labor,* 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. United States Dept. of Labor,* 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Ord., Mar. 23, 1989, slip op. at 1-2. I note that the settlement agreement, Complainant's Exhibit (CX) 1; RX 2, entered into by Frady and TVA in June 1991 had not reached the hearing level and was thus not reviewed to determine whether it was "fair, adequate and reasonable," *Fuchko*, slip op. at 2; *see also Hoffman v. Fuel Economy Contracting*, Case No. 87-ERA-33, Sec. Ord., Aug. 4, 1989. No party in this case has raised an issue regarding the validity of the June 1991 settlement. *Cf. Wampler v. Pullman-Higgins Co.*, Case No. 84-ERA-13, Sec. Ord., Jan. 23, 1992; Ord. Denying Recon., June 13, 1994 (in which the complainant sought review by the Secretary of a settlement agreement entered into by the parties several years before that had not previously been before the Secretary).

[5] TVA argued at hearing, "What's the point of a settlement if he can dredge up the events that were settled --." T. 350-51. *See generally Armijo v. Wackenhut Services, Inc.*, Case No. 94-ERA-07, Sec. Ord., Aug. 22, 1994 *citing Johnson v. Transco Products, Inc.,* Case No. 85-ERA-7, Sec.

Ord., Aug. 8, 1985 (holding that settlement agreement provision may be read only as limiting the complainant's *right to sue* in the future on claims or causes of action arising out of the facts or any set of facts occurring before the date of the agreement).

[6] The ALJ entertained constant objections from the two counsel representing TVA at hearing. As indicated *supra,* many of these were unmeritorious. In this circumstantial evidence case, first establishing animus among supervisors with whom Frady had previously worked directly was crucial to presenting proof of animus among TVA officials who were responsible for the selections for the positions at issue herein. The ALJ should, therefore, not have entertained TVA's repeated objections to testimony regarding witnesses' observations of demonstrations of animus toward Frady on the basis that a proper foundation had not been laid. *See, e.g.,* T. 301. Similarly, the ALJ should not have entertained TVA's repeated relevancy objections to testimony that Frady's counsel was eliciting in order to lay a foundation for further testimony regarding supervisory animus. *See, e.g.,* T. 203-04, 206.

It is also noted that TVA counsel, on more than one occasion during the hearing, interrupted the testimony of witnesses while those witnesses were being examined by Complainant's counsel to interject their own "testimony." *See, e.g.,* T. 311, 353-54; *see generally* 29 C.F.R. § 18.36 (Standards of conduct), §18.37 (Hearing room conduct).

[7] TVA's focus at hearing on Frady's lack of "any specific knowledge" that any of the selecting officials would have intended to discriminate against him was misplaced in this case in which Complainant is relying on circumstantial, rather than direct, evidence of discriminatory intent, *see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); discussion, *infra* and at n.3.

[8] I note that the substance of Frady's testimony indicates complete candor, both at hearing and at deposition. Although his testimony evinces some tendency toward hyperbole, *cf.* T. 28 ("I turned in a concern [at the Watts Bar plant] only after they threatened to kill me.") *with* RX 25 (report of Watts Bar Human Resources office investigation of Watts Bar altercation in which an irate electrical engineer addressed Frady in an abusive manner and asked him to "step outside"), the essential facts presented in his testimony are, with few exceptions, corroborated by documentary evidence or the testimony of other witnesses. I note that it is significant that much of this corroboration is provided by witnesses whose testimony was not self-serving. *See Universal Camera Corp.,* 340 U.S. at 496. I also note that Mike Miller, Frady's TVA supervisor for four to five years, testified that he had known Frady to be a truthful individual. T. 354.

[9] This program was implemented in 1991 to aid displaced TVA workers to transition to other jobs. T. 244-45 (Raines).

[10] Frady's uncontradicted testimony indicates that, on more than one occasion, he questioned general practices related to safety, rather than isolated incidents of noncompliance with safety standards in the nuclear plants. T. 25-30. Frady also testified that, as a result of such noncompliance, the Watts Bar plant experienced a work stoppage and was the subject of newspaper coverage regarding safety problems there. T. 30-31. According to both Frady's testimony and documentation introduced at hearing, another incident of protected activity involved Frady's raising a concern regarding an apparent threat made to Frady by an electrical engineer at the Watts Bar nuclear plant in the course of Frady's performance of his duties as a quality control inspector. T. 28; CX 16, RX 25; *see* T. 562-73.

[11] The third manager, Jeffrey H. Swanson, Mechanical Maintenance Manager at the Watts Bar plant, testified that he had no knowledge of Frady prior to his interview; he also testified that he had worked for TVA "slightly more than two years" at the time of the hearing, which would mean that he had been with TVA only about one year at the time the interviews for these positions were held, and would not have worked at the Watts Bar plant when Frady had. T. 557. Poole and Rinehart testified that they had worked for several years at the Sequoyah plant. T. 531, 536.

[12] The committee responsible for the steamfitter selections was comprised of M. Raymond Rinehart, Mechanical Maint. Manager at the Sequoyah plant, T. 536, Harlan Sutherland, representing the steamfitters' union, T. 387, and Green. *See* RX 7C. The committee responsible for the machinist selections was comprised of Rinehart, Green and Edward Pierce, representing the machinists' union, T. 387. *See* RX 7C.

[13] It is clear, however, that *some* of the selectees did have more relevant "hands on" experience than Frady. *See, e.g.,* T. 418 (Green testimony regarding selectee who had several years as a "subjourneyman" machinist).

[14] Green noted as significant the fact that a candidate for the instrument mechanic position, *see* discussion *infra*, was personally familiar with the equipment at the Sequoyah plant, although Green did not attest to that candidate having any pertinent "hands on" experience. T. 405.

[15] Frady's resume indicates the following experience or education relevant to "manual dexterity" and "mechanical ability": an Associate of Applied Science Degree in Architecture, completion of an additional college course on mechanical engineering, and completion of a computerized drafting course. RX 20. In addition, Frady's testimony indicated that he had worked at TVA in the field of Chemical Metallurgy, and that, as a TVA inspector, he had been certified to engage in various types of non-destructive testing to detect flaws in metal components. T. 23-4, 99.

[16] Frady has not challenged the decision not to interview him for the steamfitter trainee position at the Watts Bar plant. I

also note that the record indicates no basis for a conclusion that the decision not to interview Frady for that position at the Watts Bar plant was motivated by retaliatory animus.

[17] The vacancy announcements for the machinist and steamfitter positions at the Watts Bar and Sequoyah plant stated that the closing dates were January 14, 1992 and December 28, 1991, respectively. RX 11A, 7A. Green testified, however, that the selections were made months before those dates. T. 432-37.

[18] Green testified that all the instrument mechanic selectees demonstrated their understanding of a PNP transistor. T. 402-04. In regard to one candidate's correct answer to the interview question about the PNP transistor, Green stated "And I have no knowledge that she was primed or anything." T. 406. Apparently attempting to minimize the damaging effect of this statement on the credibility of the selection process, Green added "There would have been no reason for that. These [answers] were [expected to be] just kind of off the top of your head." T. 406. Green's statement that there would be no reason for a candidate to be "primed" before the interview is wholly inconsistent with his statements that all the selectees answered this question correctly and that an understanding of the PNP transistor was deemed by the instrument mechanic selection committee to be necessary to the requisite basic understanding of electronics. *See* T. 402-03. Although these comments concern the selection of the instrument mechanic trainees only, they reflect on the integrity of the committee selection process as it pertains to Frady's nonselection.

[19] Alex Lee Sewell, TVA Records Officer, testified that it was typical for a change in the PHR to be delayed six or more weeks. T. 268-69. TVA provided no explanation for its failure to expedite that process in these circumstances. *See generally Orr v. Brown & Root, Inc.*, Case No. 85-ERA-6, Sec. Dec., Oct. 2, 1985 (addressing complainant's breach of settlement complaint).

[20] Rinehart, who had not been present at Frady's interviews but who had discussed the candidates' qualifications with representatives who substituted for him at the interviews, recalled very little about the candidates' qualifications, beyond the general issue of their having more "hands on" experience than Frady. *Cf.* T. 375-81, 385-95, 410-25, 438-40 (Green regarding pertinent "hands on" experience) *with* T. 541-47, 550-52, 554-55 (Rinehart on same subject).

[21] Testimony indicated that derogatory comments about Frady had been made by various supervisory personnel, including a supervisor who told one of Frady's fellow inspectors that he and Frady went "overboard" in the performance of their duties. T. 301-05.

[22] Green testified regarding the committee selection process for the instrument mechanic trainee position, and he did not indicate that Frady had not met the minimum qualifications for the position. T. 395-411. Rather, Green's testimony about the

committee selection process indicated that only those applicants who possessed the minimum qualifications were interviewed. T. 375. Furthermore, the record indicates that, at the time that he applied for this position, Frady held an Associate Degree of Applied Science in Architecture, which included a general electrical course, T. 78, and had specialized in inspections of electrical connections and wiring for the past several years as an inspector. CX 8; T. 24, 28-9, 78-81; *see* T. 107-15. I therefore conclude that Frady demonstrated to the selection committee the necessary minimum qualifications for this position, as indicated on the vacancy announcement for the position, RX10A, including the equivalent of a technical Associate of Science degree. I also note that Green referred at hearing to the requirement for an Associate Degree in electrical or electronics technology, T. 400, but that requirement was not stated on the vacancy announcement, RX 10A.

[23] The committee responsible for the instrument mechanic selections was comprised of Green, Roger Poole, Instrument Maintenance Group Manager, T. 530, and Thomas O'Neal, representative for the electricians' union, T. 398-99. *See* RX 10C.

[24] Poole testified that, although he had been an electrician before beginning his career at TVA, he nonetheless completed a three and one-half year TVA training program in electronics to prepare him to work there as an instrument mechanic. T. 531. I note that this testimony provides support for Green's reasoning concerning the distinction between knowledge of electrical equipment and of electronic equipment.

[25] The two most recent performance reviews in the record indicate that Frady was "conscientious", "dependable", had an "excellent attitude" toward his job, "coordinates well with his peers, supervisors and other plant employees", used "good judgment" and was "very professional" in the performance of his assigned duties. RX 20 at 3-6. Miller testified that Arney, Frady's supervisor while Frady was on special assignment to the Watts Bar plant, told Miller to rate Frady's performance as "marginal." T. 351.

[26] These two inspectors were returned to work at the Sequoyah plant pursuant to an agreement between the parties dated June 24, 1992. *Smith and Smith*, slip op. at 1. The fact that these inspector positions were not filled in the usual course of business, in June 1992, does not undermine the conclusion that the pressures of downsizing, as discussed *infra,* were not determinative of Lumpkin's decision not to fill the inspector position in August 1991. The record also indicates that Frady had been promoted to the SE-5 nuclear inspector level at the same time as Messrs. Smith and Smith. RX 12A at 6, 7.

[27]
TVA urges that cases arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1988 ed. and Supp. V), require the application of a higher standard to an

employee who is challenging a termination that occurs in the course of a RIF. Respondent's Post-hearing Brief at 23-4. This argument is without merit. TVA cites decisions of the United States Court of Appeals for the Sixth Circuit stating the criteria, first enunciated in *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984), for establishing a *prima facie* case of discriminatory discharge in an ADEA RIF situation. Contrary to TVA's contention, the *LaGrant* progeny discuss not only the indefensibility of concluding that every member of the class protected by the ADEA has been discriminatorily discharged when terminated during a RIF but also the need to adapt the *McDonnell Douglas Corp.* criteria to permit complainants to establish a *prima facie* case of discriminatory discharge in situations in which a complainant's position was not filled following his/her termination. *See, e.g., Barnes v. Gencorp Inc.*, 896 F.2d 1457, 1465-66 (6th Cir. 1990). The Sixth Circuit court has thus indicated that the *McDonnell Douglas Corp*. criteria, as applicable to a discharge under the ADEA, is not to be mechanically applied and that an *ad hoc* analysis is required in each case to determine whether a complainant has met his/her preliminary burden of raising an inference of discriminatory discharge based on age. This burden is analogous to that required of a complainant under the ERA, in which evidence, either circumstantial or direct, is required to establish an inference of discriminatory action, *see, e.g., Couty v. Dole,* 886 F.2d at 148. It is also noteworthy that Frady is not challenging TVA's termination of him but is challenging TVA's failure to select him for any of the various positions for which he was qualified and for which he applied prior to the effective date of his RIF termination. Finally, TVA's reliance on the *LaGrant* progeny arising under the ADEA, including the unpublished decision in *Smith v. Tennessee Valley Authority,* 924 F.2d 1059 (6th Cir. 1991)(table), is particularly ill founded in this case containing evidence of retaliatory animus because, as observed by the Supreme Court, "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination. . . .", *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

TVA also incorrectly argues that Frady must show that he was treated differently from similarly situated employees. Respondent's Post-hearing Brief at 27-31. As stated by the United States Court of Appeals for the Sixth Circuit in *DeFord v. Secy. of Labor,* 700 F.2d 281, 286 (6th Cir. 1983), such a requirement "would take no account of the possibility that more than one person might be exposed to the same type of discrimination." In the instant case, it is noted that another nuclear inspector, who was participating in the ETP with Frady, was also not rejected for the position of Instrument Mechanic trainee at the Sequoyah plant. *See* RX 10C.

[28] The package of applications for the inspector position had not been forwarded to Lumpkin's office from the office of Alvin Black, a personnel officer, at the time the decision not to fill the vacancy was made. T. 346, 357 (Miller).

[29] Between the time that Frady filed his application and he received notice that the position would not be filled, he telephoned Miller and advised him that he had applied. T. 175-77 (Frady), 335-38 (Miller). Although I credit Miller's testimony that he did not advise Lumpkin that Frady had applied for the inspector position, T. 337, I also note that the applications had been delivered to Alvin Black, a TVA personnel officer who is a collateral manager in the TVA organization, *see* RX 9B, Lumpkin memorandum at 3.

[30] Lumpkin testified that the T.D. Martin company conducted a staffing study of TVA in 1991 and that the company's recommendations were provided to higher level managers, including Lumpkin, for response. T. 503-09.

[31] For example, Lumpkin did not deny having had a discussion with Frady, just weeks before the hearing, at a TVA car auction. T. 524-25. Frady testified that Lumpkin had told a companion at the auction, in Frady's presence, that Frady was one of "the few inspectors that we TVA managers could not intimidate." T. 180. Lumpkin testified that he did not remember having made that statement but that he would agree that he did not "think anybody intimidates Frady." T. 524. Frady also testified that, on that occasion, Lumpkin remarked that derogatory comments had been written about Frady by supervisors Arney, Crowe and Martin. T. 180. Lumpkin did not expressly deny having made such statements to Frady; he instead responded on cross-examination that he and Frady, on that occasion, "may have had some general discussion on our history together." T. 525.

Frady also testified that, when he received his first RIF notice in November 1990, it was delivered to him personally by Lumpkin who stated, with Arney present, "I'm sorry, you're going to lose your house, your car and your land." T. 181-82; *see* T. 188-91. Frady's testimony indicated that this exchange played a role in the Section 210 complaint that was resolved by settlement in June 1991. T. 181-82. Lumpkin denied that he made any vindictive statements to Frady. T. 511-12. Lumpkin testified that Frady's responding to the November 1990 RIF notice with statements concerning the employment options available to him "frustrated" Lumpkin. T. 523, 525. Lumpkin testified that Frady had been "vociferous", albeit "in a professional way", in stating his objections, which Lumpkin noted were shared by other inspectors, to a change in the TVA inspection policy to permit fewer inspections of any particular component in the plants if certain criteria were met. T. 520-21, 527-29.

[32] The T.D. Martin staffing study proposed that Lumpkin's unit have 23 quality auditors and 22 quality inspectors, effective October 1991. RX 9B. Lumpkin's memorandum stated that he would maintain the number of auditors and inspectors that were on his staff in August 1991, which was 27 quality auditors and 20 quality inspectors. *Id.*

[33] Lumpkin is included in this figure as the unit manager. *See* RX 9B.

[34] Smith testified that he discovered that the vacancy announcement had been issued for a SE-5 Nuclear Inspector at the Sequoyah plant when Ted Willoughby, a Level 3 Lead Inspector with TVA, telephoned the Eastgate ETP office in Chattanooga when he was actually trying to reach an inspector in the RIF program at the Riverside ETP office in Chattanooga. T. 306-07, 310-11.

[35] James Boykin, of TVA's Inspection Services Organization, described an outage as "when they bring the plant down for refueling and . . . they try to take care of lots of maintenance activities." T. 221-22.

[36] On cross-examination, Miller acknowledged that, although he could not recall specifics, he "probably" had heard Ezell make derogatory comments about whistleblowers. T. 347. Ezell's testimony was evasive and contradictory and his attempts to refute the testimony of Frady and Smith were not persuasive. T. 456-58, 467-71.

[37] Although Frady testified that he had mailed a resume, which was specifically drafted to focus on his experience with inspections in the civil area, T. 107-08, he failed to submit a copy of such resume as evidence in this case. *See id.* In view of the disposition of this complaint, I need not reach the issue of Frady's qualifications for a civil inspector position with SWEC. *See* T. 107-15; R. D. and O. at 9.